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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 ALI ALEJANDRO MENDOZA,
11 an individual,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA;
15 CITY OF NATIONAL CITY; THOMAS
16 MALANDRIS; BENJAMIN PECK; and
17 MICHAEL NUTTALL,

Defendants.

Case No.: 15cv1528-JAH (BGS)

**ORDER GRANTING DEFENDANTS’
UNITED STATES OF AMERICA,
CITY OF NATIONAL CITY, AND
BENJAMIN PECK’S JOINT MOTION
TO SEVER**

18 **INTRODUCTION**

19 Before the Court is Defendant United States of America’s (“Defendant”) motion
20 to server the negligence claim or alternatively, for a separate bench trial, joined by City
21 of National City (“National City”) and Benjamin Peck (“Peck”) (referred to collectively
22 as “Co-defendants” or “City Defendants”). Doc. No. 133. The motion has been fully
23 briefed. Doc. Nos. 142, 146. The Court deemed Defendants’ motion to sever suitable
24 for adjudication without oral argument. See CivLR 7.1 (d.1). After a careful review of
25 the parties’ submission and for the reasons set forth below, Defendants’ joint motion to
26 server the first cause of action for negligence is **GRANTED**.
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DISCUSSION

The United States moves to sever the negligence claim against it from the civil rights claims Plaintiff alleges against Co-Defendants pursuant to *Fed. R. Civ. P. 21* or alternatively for separate trials pursuant to *Fed. R. Civ. P. 42(b)*. Defendant argues that the factual and legal issues to be resolved regarding the circumstances of the auto collision, the extent of Plaintiff's physical injuries, and any future medical needs, are entirely distinct from and irrelevant to those to be adjudicated in the civil rights action against the Co-defendants. The United States further contends that unlike the Co-defendants in this case, the United States faces no procedural impediment¹ to a bench trial going forward at the Court's earliest convenience and therefore severing the claim would avoid delay and potential erosion of witness memories, increase efficiencies, reduce the likelihood of confusion by the jury on the issues, reduce the number of witnesses, attorneys and evidence involved in the bench trial, and avoid the need to have jurors digest evidence on issues upon which they will not render a verdict.

The Co-defendant's join the United States in its motion to sever, adding that the National City Defendants would be significantly prejudiced if forced to incur additional and unnecessary expenses preparing for and defending a lengthy trial involving unrelated issues, evidence, and testimony. The National City Defendants enumerate the various experts and witnesses (19 retained experts and 8 witnesses) likely to be called by the United States and Plaintiff; none of whose testimony would be relevant to the issues that face them. In addition, they highlight that a verdict on liability for the auto collision and appropriate damages is irrelevant to the determination of whether

¹ The Court notes that the procedural posture of the case has evolved since the filing of the instant motion. At the time of filing, National City and Peck had a pending motion to strike portions of Plaintiff's Third Amended Complaint. The Court has since ruled on the motion to strike. On January 5, 2018, National City and Peck filed a motion to amend the scheduling to order, now pending before the Court, to allow the Court to entertain a second motion for summary judgment. On January 22, 2018, the Court granted the United States and Plaintiff's joint motion to reopen expert discovery for the limited purpose of providing all reports and medical evidence not previously provided. The experts were to prepare and exchange supplemental reports by March 8, 2018. A telephonic status conference is currently set for April 26, 2018 to determine whether a further settlement conference will be held. Nonetheless, the United States maintains that the cases remain in a different procedural posture.

1 Plaintiff's civil rights were violated and therefore jurors should not be required to digest
2 evidence on matters that they will not be asked to decide.

3 In response, Plaintiff asserts that severing the trials would waste, not conserve,
4 judicial resources as the same evidence presented at trial against the United States would
5 be presented against the Co-defendants, requiring a duplication of effort among the
6 parties and witnesses. Plaintiff reasons that the events that transpired at the hospital,
7 which give rise to the civil rights claims against Co-defendants, were a direct result of
8 the underlying conduct supporting the negligence claim against the United States.
9 Plaintiff maintains that the cause of his hospitalization is evidence that must be put
10 before the jury to assist the jury in determining whether his constitutional rights were
11 violated, to avoid jury speculation of Plaintiff's wrongdoing or misconduct and to
12 permit it to appropriately assess the magnitude of emotional distress suffered by
13 Plaintiff. In addition, Plaintiff argues that his Bane Act claim would be unduly
14 handicapped if denied the opportunity to produce supporting evidence that Plaintiff's
15 blood draw was a deliberate and spiteful effort to protect Special Agent Malandris from
16 the consequences of his own negligence.

17 Plaintiff also challenges the United States' assertions that prejudice will be
18 suffered by all Defendants if the claims are not severed or, alternatively, the trials are
19 not bifurcated. Plaintiff highlights that the likelihood of confusion by the jury is
20 alleviated where (1) the negligence claim against the United States will be adjudicated
21 by the Court and (2) the jury is instructed and provided with verdict forms clarifying
22 the issues it is to consider. Plaintiff argues that the United States has not met its burden
23 in proving that bifurcation will promote judicial economy and avoid inconvenience or
24 prejudice, and reiterates that separating the claims or trials will result in the duplication
25 of effort of all involved. Since the outcome of one will not have a determinative effect
26 on the other, Plaintiff contends that bifurcation would be unnecessary.

27 Lastly, Plaintiff advises of his intent to request an advisory opinion from the jury
28 as to the dual agency of Malandris and National City's negligence under the alleged

1 dual employer theory. Plaintiff proposes that in the event of a reversal on appeal, the
2 jury would have already been presented with the necessary evidence and ruled on these
3 issues, avoiding the need for a second trial or rendering moot the need for an appeal in
4 the first instance.

5 Addressing Plaintiffs request for an advisory jury, the United States distinguishes
6 *Hamm v. Nasatka Barriers Inc.*, 166 F.R.D. 1, 3 (D.D.C. 1996). The United States
7 argues: (1) there are no legal or damages claims in common between the United States
8 and Co-defendants; (2) a jury will not be asked to resolve the issue of dual liability
9 or Malandris' individual negligence as part of any currently pending claim; and
10 (3) the doctrine of qualified immunity renders an advisory jury improper on the
11 constitutional claims against Malandris under *Bivens*.

12 ANALYSIS

13 Under Rule 42(b), the court, may order a separate trial of one or more separate
14 issues or claims “for convenience, to avoid prejudice, or to expedite and economize.”
15 *Fed. R. Civ. P. Rule 42(b)*. Federal Rule of Civil Procedure 21, however, gives the
16 court broad discretion to sever “any claim against a party” and order a separate
17 proceeding. *Fed. R. Civ. P. Rule 21; In re: Incretin Mimetics Prod. Liab. Litig.*, No.
18 13MD2452 AJB (MDD), 2015 WL 12699872, at *3 (S.D. Cal. July 28, 2015) (A court's
19 discretion under Rule 21 is broad, and “[t]he court may sever the claims against a party
20 in the interest of fairness and judicial economy and to avoid prejudice, delay or
21 expense.” (Citations omitted)). “When a claim is severed, it becomes an entirely new
22 and independent case.” *Herklotz v. Parkinson*, 848 F.3d 894, 898 (9th Cir. 2017) (citing
23 5th, 7th, and 8th circuit case law holding that when a single claim is severed, it proceeds
24 as a discrete, independent action for the purpose of finality and appealability.)

25 While the Court notes that the claim against the United States for negligence
26 bears some relation to the claims against the City Defendants, the inverse does not hold
27 true. The mere fact that the civil rights claims against Co-defendants may be a direct or
28 indirect result of the underlying conduct supporting the negligence claims against the

1 United States, does establish a common question of law or fact. *See Coughlin v. Rogers*,
2 130 F.3d 1348, 1351 (9th Cir. 1997) (claims that are discrete, and involve different legal
3 issues, standards, and procedures require individualized attention, and therefore do not
4 involve common questions of law or fact.) The factual distinction between the claims
5 is evidenced by the exhaustive list of expert and witness testimony that is relevant to
6 one claim and wholly irrelevant to others. Plaintiff's position that the same evidence
7 presented to support claims against the United States would be presented against the
8 City requiring a duplication of efforts amongst witnesses is unpersuasive in light of
9 Plaintiff's failure to specify the witnesses that would potentially overlap.

10 The Court also considers (1) the procedural posture of the case as to each
11 Defendant, (2) undue delay, (3) the expense, resources and effort required by the parties
12 and jurors, (4) juror confusion caused by receiving evidence it will not be required to
13 decide, (5) potential prejudice to Defendants if the motion is denied, and (5) the
14 potential prejudice to Plaintiff if the motion is granted.

15 The Court finds that Plaintiff's claims against the United States are sufficiently
16 distinct from those alleged against the remaining defendants to warrant a severance
17 pursuant to Rule 21². Even though the court is unpersuaded by the United States'
18 assertion of prejudice as a result of undue delay, the Court, finds that likelihood of juror
19 distraction will be significant and of such a nature that curative or limiting instructions
20 may be insufficient under these circumstances. The quantum of evidence relating to the
21 liability and damages resulting from the alleged actions committed by the United States'
22 negligence is wholly unrelated to the alleged liability and damages resulting from the
23 alleged actions committed by the Co-defendants. In addition, the Court finds that the
24 percipient witnesses involved as to proving liability for each Defendant's alleged
25 misconduct are few. The Court also finds that Plaintiff's concerns regarding the any
26 jury speculation as to the cause of Plaintiff's hospitalization may be resolved in motions

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28 ² For the reasons stated herein, the Court need not decide whether Rule 42(b) is appropriate.

1 in limine and that judicial efficiencies are obtained in separate trials in this case. Lastly,
2 Plaintiff's suggestion that an advisory jury determination will be necessary or would
3 otherwise facilitate future proceedings in the event of reversal has little merit.

4 For the above reasons, the Court finds severance appropriate here. And,
5 consistent with the Court's practice of allowing the party with the burden to elect which
6 severed case is to be tried first, the Court finds no prejudice will result in allowing the
7 Plaintiff to elect which trial will be first to proceed.

8 **CONCLUSION**

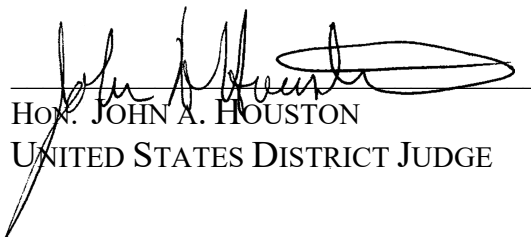
9 For the reasons set forth, the Defendants' joint motion to sever is hereby
10 **GRANTED.**

11 **IT IS HEREBY ORDERED** that Plaintiff's claim against defendant United
12 States shall proceed under the above-styled case number. Plaintiff's claims against
13 National City and Peck shall be severed into a new case number.

14 **IT IS FURTHER ORDERED** that the Clerk of the Court shall assign a new
15 case number for Plaintiff's claims against Defendants National City and Peck. The
16 Clerk shall waive payment of a filing fee.

17 **IT IS SO ORDERED.**

18 DATED: April 18, 2018

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20 HON. JOHN A. HOUSTON
21 UNITED STATES DISTRICT JUDGE
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